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# Supreme Court of the United States

OCTOBER TERM, 1968

No. 1182

THE STATE OF NEW JERSEY and
HOWARD YEAGER, Warden, New Jersey State Prison,
*Petitioners,*

*vs.*

MORTIMER L. SCHULTZ,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No.

STATE OF NEW JERSEY, and HOWARD YEAGER, Warden, New Jersey State Prison,

*Petitioners,*

*vs.*

MORTIMER L. SCHULTZ,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on November 20, 1968, and a petition for rehearing denied December 23, 1968.

### Opinions Below

The opinion of the District Court of New Jersey is reported at 293 F. Supp. 794 (1967). The opinion of the Court of Appeals for the Third Circuit is reported at 403 F. 2, 693 (1968). They are also reprinted in the Ap-

pendix. The opinion of the Supreme Court of New Jersey is reported in 46 N. J. 254, 216 A. 2d 372 (1966) cert. den. 384 U. S. 918 and is also reprinted in the Appendix.

## Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on November 20, 1968. A timely petition for rehearing was denied on December 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## Questions Presented

POINT I—Does the production, pursuant to a valid subpoena *duces tecum* of documents, some of which are alleged by defendant to be personal but are not identified nor asserted to be the basis for the criminal conviction, violate the Fourth Amendment?

POINT II—Can the only general partner in a limited partnership invoke the Fourth Amendment to preclude the inspection of its records by subpoena *duces tecum* where the interests of the limited partners may be transferred freely regardless of his approval?

POINT III—Are not comments by the prosecutor in summation and by the court in its charge on a highly intelligent *pro se* defendant's failure to take the witness stand permissible, when throughout the trial defendant gave testimony under the guise of cross-examining witnesses, and when in his summation he gives no explanation of his failure to testify under oath, and makes a purported admission of the facts of the State's charge against him, but denies the crucial criminal intent?

## Statement of the Case

After a trial in the Essex County Court on 12 indictments containing 74 counts relating to commercial fraud,

defendant Mortimer L. Schultz was found guilty on 67 counts and not guilty on 3 counts; the remaining 4 having been dismissed by the court. The sentences imposed aggregated 10 to 20 years (330a-335a). Defendant's appeal to the Appellate Division was certified before argument by the New Jersey Supreme Court. In a *per curiam* opinion, the conviction was affirmed. *State* v. *Schultz,* 46 N. J. 254, 216 A. 2d 372 (1966). The United States Supreme Court refused certiorari. *Schultz* v. *New Jersey,* 384 U. S. 918 (1966). Defendant's petition for *habeas corpus* in the United State District Court for the District of New Jersey was granted on November 21, 1967. The Court of Appeals for the Third Circuit in a *per curiam* opinion, affirmed that decision on November 20, 1968. The State's timely petition for a rehearing, was denied on December 23, 1968. The State of New Jersey seeks review of the order granting the writ of *habeas corpus.*

In July of 1962, in response to letters of complaint, the New Jersey Bureau of Securities began an investigation of the First Jersey Securities Corporation, a registered broker-dealer (112a). The Bureau's investigation disclosed that First Jersey had been acquired by Office Buildings of America in late 1962 (117a). Schultz was the principal stockholder, president and chairman of the board of the latter corporation. See *Conroy* v. *Schultz,* 80 N. J. Super. 443, 444, 194 A. 2d 20, 21 (Ch. Div. 1963). Office Buildings, after having made contracts to acquire income producing property, created limited partnerships to provide the funds to close title. The properties were conveyed to the various partnerships but leased back from them under an arrangement whereby the investors were guaranteed a fixed annual return. Of the eleven partnerships organized by Schultz, he was the sole general partner in all but one. The accounting for these limited partnerships was handled by First Jersey Servicing Company, a trade name for Schultz and acquired by Office Buildings in 1962. 80 N. J. Super. at 445-446, 194 A. 2d at 21 (117a).

First Jersey Securities Corporation served as the vehicle for distribution to the public of unit participation in the various limited partnerships. Each prospectus issued regarding these ventures was prepared under Schultz's auspices. 80 N. J. Super. at 445, 194 A. 2d at 21. As the dominant personality in the entire real estate syndication and promotion, Schultz was able to sell to the public units in the respective limited partnerships which he did not own.

In late June of 1963, after one year of investigation, during which time the Bureau became aware that Schultz was running First Jersey but was still unaware of the extent of his involvement in the other limited partnerships (122a-123a), subpoenas were issued to Schultz (116a), First Jersey Servicing Company and Sherman Hirschfeld (115a), an accountant, who had a power of attorney for the Company (3a). The latter two subponeas were served June 27, 1966, on Hirschfeld at the Wiss Building in Newark, which was owned by Wiss Building Associates, a limited partnership created by Schultz (118a).

First Jersey Servicing Company was directed to appear forthwith and to bring "all books, records, papers and documents" (1a). Hirschfeld was ordered to appear forthwith and to bring "all personal records of Mortimer L. Schultz and First Jersey Servicing Co., including the records of any participating certificates sold by Mortimer L. Schultz, bookkeeping and financial statements of Mortimer L. Schultz's activities, San-Mac Associates, Wiss Building Associates" (3a). In compliance with the directives, Hirschfeld assisted in moving the books covering practically all the partnerships (119a) to the Bureau's office and volunteered to leave them there (120a).

In answer to his subpoena, Schultz appeared with counsel before the Bureau of Securities and after stating his name and occupation, invoked his privilege against self-

incrimination (339a-340a). He agreed to answer questions about Lin-Bay Realty, a limited partnership in which he was a limited partner (340a). He was not questioned on any other subject.

The New Jersey Bureau of Securities, on the strength of its investigation of Schultz's activities went before the Chancery Division of the Superior Court of New Jersey to enjoin him from issuing, selling or engaging in the sale of securities since he was not a registered broker-dealer and had employed fraudulent devices in his dealings. Schultz was so enjoined in September, 1963. *Conroy* v. *Schultz,* 80 N. J. Super. 443, 194 A. 2d 20 (Ch. Div.).

On December 19, 1963 and January 2, 1964, the Essex County Grand Jury returned 12 indictments charging Schultz with 74 counts of business fraud and misrepresentation. He engaged counsel and entered a plea of not guilty to the charges. The trial began May 13, 1964, with defendant now appearing *pro se.* Although no pretrial motion had been made, during trial Schultz sought to suppress "everything that the Bureau of Securities has ever had in its possession and that the Prosecutor's office ever got from the Bureau of Securities . . ." (108a). Defendant alluded to some of the records as being personal (74a, 86a, 126a) but rather than identify them he chose to oppose the introduction of all documentary evidence obtained from the Securities Bureau (89a, 107a, 130a, 137a-138a). The basis of defendant's suppression motion was "because it was secured without a search warrant" (130a, 128a, 136a) which in turn could not have been obtained since there was no "reason to believe a crime was being committed" (124a). After receiving testimony from a Bureau investigator that all of the books were produced as a result of the Bureau's subpoenas and used in the course of its investigation (120a), the court denied the motion finding that the Bureau had acted in compliance with the subpoena power granted it under N.J.S.A. 49:3-45 (then 49:3-16) (144a).

During his cross-examination of the various witnesses for the State, Schultz repeatedly pharaphrased or supplemented the witness's answer with facts within his own personal knowledge. The following are typical of his technique.

"Q. Who signed most of my personal checks? A. During this period of time I did.

Mr. Schultz: I am again driving, sir, at my salary. The checks were endorsed on the back and deposited for Mortimer L. in the Suburban Bank, in multiples of a thousand dollars, sir. They add up, sir, to $43,000. total for the year.

The Court: Are you testifying, Mr. Schultz, or is there a question? You are not under oath. (148a)

* * *

*By Mr. Schultz*:

Q. Now, Mr. Greyson, in view of that resolution is there anything unusual about hiring or paying two trainees who were both qualified by the National Association of Securities Dealers, to be security salesmen?

Mr. Walder: Excuse me, your Honor.

The Court: Mr. Schultz, I am going to ask you to raise your right hand, and I am going to administer an oath to you pretty soon—that you are testifying to this witness (151a-152a).

* * *

*By Mr. Schultz*:

Q. In connection with the Seaman Brothers transaction, Mr. Mastrangelo, is it not so that about the 15th or 16th there was a discussion in your office whereby the contract would either be taken in this

form on the 17th or if not, it was to be taken as a joint venture between members of your firm and Mr. Victor Paul under the following circumstances and conditions: that if OBA could not successfully syndicate the property by, say, August of 1963 or whatever date was set in here, being a short date for closing, if you recall, that then your group would take title, but in the event the syndication was successfully performed in time, your group would merely get it free?

Mr. Walder: I object.

Q. Isn't that what happened, sir?

The Court: Sustain the objection.

Mr. Schultz: Your Honor, I'm endeavoring to lead the witness to state the facts as they occurred.

Mr. Walder: Your Honor please, Mr. Schultz will have the chance to testify. (161a)

• • •

*By Mr. Schultz*:

Q. Don't you know as a fact that Seaman Brothers were founded in 1888 is strong and is now merged with Hunt Brothers, and that's not a reasonable answer to say they had bad financial condition?

Mr. Walder: I strenuously object to Mr. Schultz's comments. He'll have an opportunity to testify. (162a)

(See also 146-12a, 147-1a, 149-22a, 153-5a, 159-1a, 163-2a).

He was not unaware of the technique he was using, commenting to the court "I knew what the true answer would

be. I have been trying to force the true answer out." (164a). Each transgression prompted an objection by the prosecutor on the ground that defendant ". . . can ask questions. If he wants to testify, he will have his opportunity" (153a). The court also rebuked him on each occasion in a manner such as the following:

> "Are you testifying, Mr. Schultz, or is there a question? You are not under oath?" (148a).
>
> * * *
>
> "Well, when you get on the witness stand and you are sworn, I will permit you to testify, but I can't let you testify when you are acting as counsel. Reframe your question." (146a).
>
> * * *
>
> The Court: "Of course the jury is instructed that Mr. Schultz is not sworn and his statements are not under oath and aren't evidence and cannot be considered as evidence." (150a).

At a side bar discussion, Schultz indicated that ordinarily he would not object to taking the stand but was reluctant to do so because he was afraid a prior conviction would be brought out in an attack on his credibilty (147a). In contradiction to the above stated fear, defendant in his summation attempted to excuse his failure to take the stand for the following reason:

> ". . . Have I taken the stand? I could have done nothing but say the facts are true the intent is gone and there is no intent. What else could I say? What else could I explain? (358a-359a).

Both the prosecutor (188a) and the court (279a), in accordance with the then existing law as set out in *State* v. *Corby*, 28 N. J. 106, 145 A. 2d 289 (1958), commented on defendant's failure to testify.

June 15, 1964, the day the court concluded its charge, was also the day *Malloy* v. *Hogan,* 378 U. S. 1 (1964) was handed down. Upon learning of that case in the following day's New York Times (300a), the prosecutor anticipating what *Griffin* v. *California,* 380 U. S. 609 (1965) a year later prohibited, requested that the jury be reinstructed, eliminating all references to defendant's failure to testify (300a). At 1:55 p.m. the court recharged the jury as follows:

> "His failure to be a witness in his own behalf raises no presumption of guilt, but if facts are testified to which tend to prove his guilt, which facts he could by his own oath deny, his failure to testify in his own behalf raise a permissible inference that he could not truthfully deny those facts.
>
> "This portion of the charge that I have just referred to shall be disregarded in every respect, and not be applied by you as the law in this case. You will consider it as not charged and likewise I instruct you that any and all comments made by the Prosecutor either during the course of the trial or in argument, or in summation in regard to the failure of the defendant to testify, are also stricken and must be disregarded, and I give you the following charge which shall govern your deliberations:
>
> "This defendant as are all defendants in criminal cases is presumed to be innocent, and this presumption of innocence stays with the defendant throughout the trial, and until you, the members of the jury, reach a verdict. The failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him, and you are charged that you must not permit the fact that he failed to take the stand to weigh in

> the slightest degree against the defendant, nor shall this fact enter into the discussions or deliberations of the Jury in any manner."

The jury returned some three hours later, with a verdict of guilty on 67 of the 70 counts.

## Reasons Why a Writ of Certiorari Should Be Granted

### Preliminary Statement

A busy court is busy because somehow it always finds time to review those cases which patently need correction. The State in the interest of harmony on both sides of the Delaware River asks for the amount of time it will take for the Fourth and Fifth Amendments to be replaced in proper perspective with regard to the facts of this case. Additionally, this Court is asked to rule upon the question of the Fourth Amendment's availability to a limited partnership such as the one here involved.

## POINT I

**Does the production, pursuant to a valid subpoena *duces tecum* of documents, some of which are alleged by defendant to be personal but are not identified nor asserted to be the basis for the criminal conviction, violate the Fourth Amendment?**

The Federal District Court of New Jersey ruled that defendant Schultz's Fourth Amendment rights had been violated by the State's use in a criminal action of the books and records obtained by two subpoenas *duces tecum* which were issued for investigative purposes by the New Jersey Securities Bureau. This ruling was affirmed by the Third Circuit Court of Appeals. In so holding, both courts

disagreed with the New Jersey Supreme Court, which rejected defendant's claim saying: "There was no search or seizure. There was a subpoena, and the representative of the corporation and limited partnerships complied with the subpoena without protest." (361a)

The District Court, in holding the subpoenas offensive to the Fourth Amendment, noted that they "called for the production of all personal records of petitioner, as well as records of businesses . . ., were served at petitioner's private office, which was also his business office . . . [and] were unlimited either as to relevancy, specificity, or time. They were so broad and sweeping in scope as to call for production of all petitioner's books and records, both business and personal" (370a). Neither the District Court nor the Court of Appeals ever specified a single book or record which was personal or remotely instrumental in Schultz's conviction. Indeed they could not have done so since defendant never made any identification of the items he claimed were personal (74a, 86a, 126a).

The New Jersey Supreme Court stressed that defendant's failure in this regard eviscerated the substance from his Fourth Amendment argument. It said:

> ". . . Defendant did not identify those records [which are personal] in his brief but after argument he referred us to nine of some 180 exhibits. The most we can find is that some of the exhibits produced by the custodian in response to the subpoena contained what appear to be individual entries concerning defendant, but for all we can tell, they may well have been part of the total records of the business operations because of the mode in which those operations were conducted. In any event, defendant makes no efforts to show how any of those entries or records bears upon his conviction as to any count." (361a)

It is beyond doubt that the evidence leading to Schultz's conviction came, not from any seized personal records, but from the inescapable deception shown in the falsified business ledgers. The Office Buildings of America receipts and disbursements ledger (S-66, 52a) clearly revealed defendant's improprieties by the absence of a credit entry corresponding to the date on which Schultz received checks for purchase orders (71a-72a, 100a-101a). The argument on the ledgers admissibility typifies Schultz's factually unsupported assertions that personal records were being used. The prosecution referred only to selected pages of this ledger and was satisfied, for the sake of minimizing the record, to admit only those pages (73a). Schultz balked at the suggestion, saying "to the extent these books would be personal records, I would raise such an objection." (74a) To placate defendant, although he had not specified what was personal, the court agreed to admit only the individual pages. Again Schultz resisted:

> "My personal records—it has nothing to do with corporate records which by statute must be available."
>
> • • •
>
> "I would rather have—I object to the pages themselves. I would rather have the entire book in evidence." (75a)

These generalized assertions never permitted the court to focus on a document which was even latently personal so that the propriety of its seizure could be evaluated. Moreover, the record repeatedly indicates that defendant opposed not those items he alleged were personal, but all records the prosecutor received from the Bureau of Securities (89a, 107a, 108a, 130a, 137a-138a). Equally plain is the fact that his opposition was based on the misconceived notion that a search warrant should have been obtained

before proper acquisition of the books and records could be made (128a, 130a, 136a). He failed to realize the unquestioned legality of evidence produced pursuant to a subpoena *duce tecum* which is issued to serve a lawfully authorized purpose.

The issuance of these subpoenas was for a purpose authorized by N.J.S.A. 49:3-45. The chief of the bureau of securities is empowered "for the purpose of any investigation . . . [to] take evidence and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records which the bureau chief deems relevant or material to the inquiry."

In construing that type of authorization, this Court has recognized that the demands and restraints of the Fourth Amendment vary with the varying interest involved, private or public. In speaking of the greater latitude allowed where the public interest is a stake, this court in *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 209 (1946) said "It's enough that the investigation be for a lawfully authorized purpose . . . and the documents sought are relevant to the inquiry. Beyond this, the requirement of reasonableness . . . comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry". See also *United States* v. *Morton Salt Co.,* 338 U. S. at 641-643 (1950); *See* v. *Seattle,* 387 U. S. at 545 (1967); *Camara* v. *Municipal Court,* 387 U. S. at 534-539 (1967); *In re Addonizio,* —— N. J. —— (1968). These cases make clear that the "probable cause" required for a search warrant is foreign to this scene. Consequently, Schultz's effort to bring out the lack of probable cause that "a crime was being committed" (124a) to support a violation of the Fourth Amendment was for naught.

The recent case of *United States* v. *Powell,* 379 U. S. 48 (1964) which involved an internal revenue investiga-

tion, recognized that since it is the court's process which is being invoked to enforce an administrative summons and since the court protects abuse of that process, the burden is on the subpoenaed person to show an abuse. 379 U. S. at 58. Assuming the two June 27, 1963 subpoenas were too broad, Schultz did not sustain the burden of proof by showing any abuse to the Court. He apparently knew or thought some of his personal checks (80a) as well as his personal diaries (90a, which he introduced into evidence 184a) were in the hands of the Bureau of Securities. Yet defendant never asked the Bureau investigator, who had enforced the subpoena, while he was on the stand whether such items were in its possession and if so how they were obtained. This lack of diligence on Schultz's part takes on added significance because both sides and the court knew that some records came to both the Bureau of Securities and the Prosecutor from the bankruptcy proceeding that had begun (79a, 92a). Even assuming some improper documents in the hands of the State for which the subpoenas were not responsible, their presence would not taint the validity of the subpoenas. Furthermore, the custodian of the corporate books, upon whom the subpoenas were served, voluntarily assisted in their removal without protest (118a). Thus, unsolicited items may have been included. These various avenues by which documents came into the State's custody point up how imperative it was for Schultz to specify what items were personal, if any, so that their manner of acquisition could be explored. Without such an identification by the only person who could make it, these lawfully authorized subpoenas cannot be questioned.

The breadth of these subpoenas also comports with the guidelines of reasonableness as set out on January 6, 1969, by the Court of Appeals for the Third Circuit in *United States* v. *De Grosa,* —— F. 2d ——, where the court rejected a Fourth Amendment attack on an internal

revenue summons saying: "In the instant case, there is no question but that the summons will not unreasonably burden the appellant. In point of fact, the appellant was able to gather the materials requested and bring them before Agent Ader at the time and place directed in the summons." So too compliance with these subpoenas was accomplished in one trip, without mistake as to that requested and without protest as to that surrendered. The Third Circuit added that even if the subpoena is served in furtherance of an investigation which is principally criminal, the coexistence of a proper civil purpose assures its validity. See also *Abel* v. *United States*, 362 U. S. 217, 225-230 (1960). The corporate records of Schultz's real estate syndication were the only ones which were decisive to civil or criminal litigation, the only ones authorized to be seized and the only ones which resulted in his criminal conviction.

The Fourth Amendment speaks to reasonableness. The concept is no less offended by the grant of federal *habeas corpus* on the theory of a violation of the Fourth Amendment when no supporting facts are cited to give the theory credence.

## POINT II

**Can the only general partner in a limited partnership invoke the Fourth Amendment to preclude the inspection of its records by subpoena *duces tecum* where the interests of the limited partners may be transferred freely regardless of his approval?**

The Federal District Court stated that the subpoena of Schultz's limited partnership records offended his Fourth Amendment right. The court ruled that "partnership records are treated the same as personal records so far as this constitutional right is concerned. *United States* v.

*Brasley,* 268 F. 59 (1920); *In Re Subpoena Duces Tecum,* 81 F. Supp. 418 (N. D. Cal. 1948)." The Third Circuit, in its denial of the State's petition for rehearing, concurred in that view.

The records of San-Mac Associates and Wiss Building Associates were called for specifically by one of the Securities Bureau's subpoenas (3a) but the records of practically all of the eleven limited partnerships organized by Schultz were obtained (119a). Defendant, as the sole general partner in all but one of the partnerships, possessed the exclusive right to manage and conduct their business. Unit participation in the various limited partnerships was offered to the public through a prospectus prepared by Schultz. *Conroy* v. *Schultz,* 80 N. J. Super. at 445, 194 A. 2d at 21. The offer of these units in the limited partnerships to the public was held by the Chancery Division of the New Jersey Superior Court to be of such a nature and volume as to constitute the sale of securities. *Conroy* v. *Schultz,* 80 N. J. Super. at 450, 194 A. 2d at 23-24. In so holding the court relied on *Securities & Exchange Commission* v. *C. M. Joiner Leasing Corp.,* 320 U. S. 344 (1943), and *Securities & Exchange Commission* v. *W. J. Howey Co.,* 328 U. S. 293 (1946), where the public sale of direct interests in real estate was equated with a sale of a security. Additionally the Chancery Division held that Schultz in promoting the public sale of participating units was acting as an agent of a broker-dealer (First Jersey Securities Corporation) without being registered.

Since the units of each of the limited partnerships were declared to be securities, lawful sale to the public could only be made after their registration. If that step was taken, the records of the limited partnerships would become part of the registration and would be required to be kept thereafter as *quasi*-public documents. In such case the Fourth Amendment would afford no shield against

the production of those documents. *Shapiro* v. *United States,* 335 U. S. 1 (1948); *Securities & Exchange Commission* v. *Olsen,* 354 F. 2d 166 (2 Cir. 1965); *Cooper's Express, Inc.* v. *I. C. C.,* 330 F. 2d 338 (1st Cir. 1964); *United States* v. *Mahler,* 254 F. Supp. 581 (S. D. N. Y. 1966). It seems unreasonable to suggest that the protection of the Fourth Amendment can be gained through the violation of another law, especially one so vested with public interest as the securities law.

A business arrangement which is inherently public cannot hide its character by taking on the title of limited partnership. The Chancery Division in *Conroy* v. *Schultz* noted that fact.

> "It is unnecessary for this court to determine whether or not the issuance or transfer of participation units or certificates of interests in real property by a genuine limited partnership, *per se,* constitutes dealing in securities under the Uniform Securities Law. For, in the instant situation, 'Wiss' had prepared for it a prospectus issued to the public at large. Sales personnel of the so-called 'underwriter,' First Jersey, solicited and prompted the sale and resale of 'Wiss' and 'San-Mac' participation units. Assignees of units in each syndication were furnished assignments which state that the assignee becomes a substituted limited partner to the extent of units assigned subject to the approval of the general partner. However, the assignment expressly provides that the failure or refusal of the general partner to grant such approval shall not affect the validity of the assignment. The actual unhampered transferability of a limited partner's interest is certainly at variance with the conventional partnership relationship. R.S. 42:2-23, 42:2-29. The participation units were, in fact, as nego-

> tiable as ordinary stock certificates. Generally, the limited partners were attracted solely by the prospect of a return on their investments, and were indiscriminately selected on the basis of available funds. Finally, the limited partners expected profits solely from the efforts of the promoter and general partner, Schultz. (citation omitted) Suffice it to say that under the facts here presented, defendant engaged in the sale of or the offering to sell 'securities' within the purview of N.J.S.A. 49:3-2(m)." 80 N. J. Super. at 452-453, 194 A. 2d at 25.

Similarly this Court, in ruling on alleged violations of the Fourth Amendment by the subpoena of an organization's records, has said it will not be bound by nomenclature. The test for determining whether the Fourth Amendment is available to limited partnerships such as the above under *United States* v. *White,* 322 U. S. at 701 (1944) is "whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common group interests only". So measured these limited partnerships can only fail. The limited partners had no identity of interests with each other or Schultz except for the expectation of profit on their investments through his manipulations. Conversely defendant had even less identity with them since he only wanted to swindle them out of their money. But more importantly, his lack of authority to prevent an assignee from becoming a fully privileged substituted limited partner is at odds with the fundamental reason for the formation of a partnership. It is also contrary to N.J.S.A. 42:2-23(4) which says "An assignee shall have the right to become a substituted limited partner if all the members (except the

assignor) consent thereto . . ." Indeed the District Court of New Jersey has stressed the importance of the privilege of selection to a partnership. In *United States* v. *Linen Service Council of New Jersey,* 141 F. Supp. 511, 513 (1956) the court adopted Chief Judge Biggs' statement that "The right to choose one's fellow members, the delectus personarum, . . . is regarded as one of the most important and indispensable characteristics of a partnership . . ." Without the ability to select, the limited partnership takes on practically every substantial attribute of a corporation. Even a genuine limited partnership has been held in New Jersey to be an entity separate and apart from its members. See Justice (then Judge) Francis' opinion in *Carle* v. *Carle Tool & Engineering Co.,* 36 N. J. Super. 36 (App. Div. 1955), 114 A. 2d 738; *X-L Liquors, Inc.* v. *Taylor,* 17 N. J. 444, 111 A. 2d 753 (1955).

The Fourth and Fifth Amendments have been held inapplicable to partnership records in *United States* v. *Silverstein,* 314 F. 2d 789, 791 (2nd Cir. 1963) cert. denied 374 U. S. 807 the court commenting:

> ". . . Through the use of the limited partnership device, the funds of many people have been gathered into common enterprises of considerable size. This would hardly have been possible without the privilige of limited liability, which was granted by the state to the limited partners in return for compliance with, among other provisions, a filing requirement . . . The choice of this form of business organization was necessarily an election to submit to a greater degree of governmental intervention than would be true of a simple common-law partnership, and to more closely approximate the corporate form";

as well as in *United States* v. *Onassis,* 133 F. Supp. 327, 335 (S. D. N. Y. 1955) where the court reasoned:

> ". . . The liabilities of individual citizens will not be advanced by ascribing them to business combinations.[17] By attempting to spread the protection granted the records of an individual to cover records shared with others as an incident of a formal business combination the quality of the protection will be adulterated and corrupted.[18]" (footnotes omitted);

and in *United States* v. *Onassis,* 125 F. Supp. 190, 210 (D. D. C. 1954) where the court was of like mind:

> ". . . Yet the right of the State to prosecute for crime should not be hindered by theoretical infringement on individual's rights. The infringement must be real, and it is not real unless the documents are personal;"

and in *People* v. *Herrmann,* 40 Misc. 2d 1089, 244 N. Y. S. 2d 1022 (Sup. Ct. 1963); 98 C. J. S. Witnesses §448 p. 285; *Cf. United States* v. *Wernes,* 157 F. 2d 797 (7th Cir. 1946).

The fraud for which Schultz was convicted was the sale to others of units which he did not own in each of the respective limited partnerships. It is without logic to allow him to claim upon appeal that an alleged personal bond between himself and those whom he mulcted renders personal for Fourth Amendment purposes the records of those limited partnerships.

## POINT III

**Are not comments by the prosecutor in summation and by the court in its charge on a highly intelligent pro se defendant's failure to take the witness stand permissible, when throughout the trial defendant gave testimony under the guise of cross-examining witnesses, and when in his summation he gives a false explanation of his failure to testify under oath, and makes a purported admission of the facts of the State's charges against him, but denies the crucial criminal intent?**

In summation Schultz said:

> ". . . Have I taken the stand? I could have done nothing but say the facts are true the intent is gone and there is no intent. What else could I say? What else could I explain?
>
> ". . . I don't deny there were short-sales, or over-allocations in connection with the operation of the creation of the real estate syndication business, but in due course they were properly covered with the full knowledge of our accountants and of our Board of Directors, of our attorneys, and they participated in it, and if it was wrong they would never have participated . . . ." (358a-359a)

The thesis of Schultz's summation is consistent with the defense tack he had taken throughout the trial—that at worst he was guilty of bad business judgment. Under the guise of cross-examination, defendant spewed facts unconnected with the questioning in an attempt to impress upon the jury that no more than business judgment was involved. Examples are:

> "Now, Mr. Greyson, in view of that resolution is there anything unusual about hiring or paying two trainees who were both qualified by the National Association of Securities Dealers, to be security salesmen?" (151a)
>
> • • •
>
> "Don't you know as a fact that Seaman Brothers was founded in 1888, is strong and is now merged with Hunt Brothers, and that's not a reasonable answer to say they had bad financial condition?" (162a)
>
> • • •
>
> "Now, is there anything inconsistent then, sir, with putting a new mortgage which is within the power of the general partner . . ." (163a)

Each of these efforts brought an admonition from the court that he would have an opportunity to testify if he desired. He told the court a prior conviction made that impossible (147a). Schultz dared not tell the jury this in summation but rather he excused his failure to testify concurrently with striking at the most intangible aspect of the State's case—the question of intent. He insinuated his honesty to the jury by purportedly admitting the facts but he withheld from them an explanation of his intent in doing the admitted facts. Again Schultz told them it was a matter of business judgment saying "if it was wrong they [accountants, directors, lawyers] would never have participated . . . ." Obviously the *pro se* conduct of his defense was a pre-conceived plan to testify but not from the witness stand. He was sufficiently clever and courtroom wise to realize that he could not stand cross-examination.

It would have been proper for the prosecutor and the court to subject Schultz's conduct to adverse comment,

even if he had given from the witness stand the facts that he tried to inject into the case while examining witnesses and in his summation. Those factual statements related only to a part of the inculpatory case against him. The remaining mass of damning evidence went unexplained. This Court dealt with such a situation in *Caminetti* v. *United States,* 242 U. S. 470 (1917). It said that where a defendant, on the stand speaks in part, his omission to speak as to other direct evidence is meaningful not as a waiver of a privilege so as to intentionally incur a known consequence but because it is sensible to permit an inference that a man who tells only part of what he knows on the proof against him cannot truthfully meet the rest. More specifically the Court declared:

> "'The accused, of all persons, had it within his power to meet, by his own account of the facts, the incriminating testimony . . . . When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him." (242 U. S. at 494)

Similarly, a *pro se* defendant's unsworn testimonial statements, after a proper warning, are treated by the courts as a waiver of his right to have no comment upon his failure to take the stand. *Redfield* v. *United States,* 315 F. 2d 76, 80 (9th Cir. 1963) (defendant persistently testified while purporting to cross-examine despite repeated admonitions from the court); *Smith* v. *United States,* 234 F. 2d 385, 388-389 (5th Cir. 1956) (the court's repeated explanations to accused during cross-examina-

tion that he could dispute the witnesses' testimony only by taking the stand held justified).

The Second Circuit in *United States ex rel. Miller* v. *Follette,* 397 F. 2d 363 (1968) affirming *United States* v. *Follette,* 278 F. Supp. 1003 (E. D. N. Y. 1968), citing *Redfield,* held that where a *pro se* defendant refers to his failure to take the stand by saying "I am just merely saying that those tools were not burglar's tools . . . I didn't take the stand so I cannot deny ownership of certain of those tools, incidentally.", comment upon the failure is proper. The court added that if the prosecutor rather than defendant had injected into the jury's consideration the defendant's failure to testify, then reversal would be required. But where defendant initiates the topic, "to regard the prosecutor's restrained remark as an error of constitutional proportions would glorify technicality". 397 F. 2 at 367. See also *Petition of Du Bois,* —— Nev. ——, 445 P. 2d 354 (Sup. Ct. 1968); Cf. *People* v. *Finney,* 88 Ill. App. 2d 204, 232 N. E. 2d 247 (App. Ct. 1st Dist. 1967) (defense counsel's comment on defendant's failure to testify justified fair comment by the state on that subject); *United States* v. *Feinberg,* 140 F. 2d 592 (2 Cir. 1944). It is noteworthy that in each of the above cases the *pro se* defendant persisted in making unsworn assertions of facts during cross-examination despite the court's warnings, and then in summation attempted to justify his failure to testify. Obviously these defendants as did Schultz adopted the same deliberately planned pattern of improper trial tactics designed to overcome through unsworn statements not subject to cross-examination, the psychological disadvantages that obviously are the lot of the defendant who does not take the witness stand in his defense.

Where a defendant personally injects proof in his favor without taking the stand, the Third Circuit and the

New Jersey Supreme Court agree that he has waived his right to have no comment made upon his failure to take the stand. In *State* v. *Fioravanti,* 46 N. J. 109, 215 A. 2d 16 (1965) reconsidered on federal *habeas corpus* in *United States ex rel. Fioravanti* v. *Yeager,* 404 F. 2d 675 (1968), the defendant put on ill-fitting trousers for the jury (which the police said had been taken from him after his arrest) to show that they belonged instead to a co-defendant. The court charged that "his failure to testify in his own behalf may be considered by you and you may infer that he could not truthfully deny the inculpatory facts adduced against him." The case, although tried before *Malloy* and *Griffin,* was governed by them. Both courts relied on *Caminetti* to approve the trial court's comment, ruling that defendant had testified by his demonstration before the jury and had done so without risking cross-examination. The Third Circuit was incensed at the boldness of the ploy saying "As we have seen, appellant directly communicated to the jury the strongest point in his defense . . . . If the jury had accepted that theory intentionally and powerfully conveyed as it was, appellant might well have been acquitted." 404 F. 2d at 677.

The District Court of New Jersey also expressed its approval of *State* v. *Fioravanti* in *United States* v. *Yeager,* 285 F. Supp. 780 (1968). The court upheld comment in the charge upon defendant's failure to take the stand where the defendant attempted to demonstrate his physical similarity to a co-defendant by standing next to him to show that the rape victim was mistaken in her identification of him. Citing *Caminetti* and *Fioravanti,* the court ruled that

> ". . . where a defendant, while not actually assuming the stand and testifying during the course of the trial, indulges in demonstrative conduct which, in effect, puts into issue the truthfulness or cor-

> rectness of the State's case against him, he thereby opens the door for fair comment by the trial judge and prosecutor . . . ." 285 F. Supp. at 783.

See also *State* v. *Mayer,* 154 Wash. 667, 283 P. 195 (1929); *Machin* v. *State,* 213 So. 2d 499 (Fla. D. C. of App. 1968).

From the outset of this case, defendant Schultz had a plan. It was one that could only be accomplished without counsel and its success, thus far, makes it certain of repetition if the State is put to the task of retrial. The thrust of defendants' plan unfolded during his cross-examination of witnesses and it was consummated in his summation. And then his devious efforts were crowned by an unexpected, and the State respectfully says, undeserved bonanza at the very brink of jury decision. The trial court, upon learning of the day old *Malloy* case, recharged the jury that

> ". . . you must not permit the fact that he failed to take the stand to weigh in the slightest degree against the defendant *nor shall this fact enter into the discussions or deliberations of the jury in any manner*" (emphasis added).

This additional charge which the State contends was not necessary under the circumstances may have given Schultz even more than the federal constitution would require if the comment was improper. See, *Griffin* v. *California,* 380 U. S. at 615, fn. 6.

## CONCLUSION

**The State firmly believes that the grant of federal *habeas corpus* has done a grave unjustice to the people of the State of New Jersey because Schultz was fairly tried and honestly convicted. It therefore prays that this Court review the matter through the issuance of its Writ of Certiorari to the end that the judgment of conviction shall be reinstated.**

Respectfully submitted,

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THOMAS P. FORD, JR.,
First Assistant Prosecutor,
*Attorneys for Petitioner.*

HUGH P. FRANCIS,
Assistant County Prosecutor,
*On the Petition.*

[APPENDICES FOLLOW]

# APPENDIX A

**Opinion of the United States District Court for the District of New Jersey (Reported in 293 F. Supp. 794)**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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MORTIMER L. SCHULTZ,

Petitioner,

*vs.*

HOWARD YEAGER, Warden,
New Jersey State Prison,

Respondent.

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CIVIL ACTION No. 664-66

MEMORANDUM AND ORDER

AUGELLI, District Judge:

This is a petition for federal habeas corpus relief. Petitioner was tried in the Essex County Court on a number of indictments handed down by the Essex County Grand Jury on December 19, 1963 and January 2, 1964. The indictments contained a total of 74 counts, charging petitioner with different types of commercial fraud, including obtaining money by false pretenses, conversion of money by a corporate officer, keeping of fraudulent accounts by a partner, circulation of false written state-

ments by a partner, omission of material particulars in books of account by a partner, and making false entries by an officer in corporate books of account.

The trial commenced on May 13, 1964, and terminated on June 16, 1964, with jury verdicts of guilty on 67 counts, and not guilty on 3 counts. The remaining 4 counts were dismissed at the trial. On August 5, 1964, petitioner, who had appeared *Pro Se* throughout the trial, was sentenced to serve terms of imprisonment aggregating not less than 10 nor more than 20 years, and he is presently confined in the New Jersey State Prison.

Following the imposition of sentences petitioner, through his present counsel, filed an appeal in the Appellate Division of the Superior Court of New Jersey. Before argument in that court, the Supreme Court of New Jersey certified the appeal, and on January 24, 1966, in a *Per Curiam* opinion, affirmed the judgments of conviction. *State* v. *Schultz,* 46 N. J. 254 (1966). On April 25, 1966, the Supreme Court of the United States denied certiorari. *Schultz* v. *New Jersey,* 384 U. S. 918 (1966). Since the petition here raises the same issues that were determined by the highest state court, petitioner has exhausted his state remedies. *Brown* v. *Allen,* 344 U. S. 443 (1953); *Fay* v. *Noia,* 372 U. S. 391 (1963).

In this Court, petitioner alleges that his conviction and sentences, pursuant to which he is being detained, are "* * * in violation of the Fourth and Fifth Amendments to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, in that petitioner's conviction was based upon evidence obtained by an unreasonable search and seizure; the petitioner was forced to incriminate himself due to the failure of the

state to accord him immunity from prosecution under applicable state law; and petitioner was subjected to numerous comments, during the course of his trial, during the State's summation and during the charge of the court, concerning his failure to testify in his own behalf."

This Court has heard argument on these issues in connection with petitioner's request for an evidentiary hearing on said issues. The request was taken under advisement. After a careful and detailed examination of the entire state court record, the Court has concluded that petitioner's federal constitutional rights have been violated in the particulars hereinafter set forth. Consequently, no evidentiary hearing is necessary.

The facts relating to the "search and seizure" and "immunity" issues are as follows:

On June 26, 1963, the New Jersey Bureau of Securities issued and served upon petitioner a subpoena, directing him to appear forthwith before the Bureau to testify regarding practices of himself and others in the sale of securities in New Jersey. On the following day, two additional subpoenas, *Duces Tecm* in form, were issued and served by the Bureau upon Sherman Hirschfeld, an accountant who had been employed by petitioner and his companies as comptroller and office manager. One of said subpoenas, addressed to Hirschfeld personally, directed him to appear forthwith before the Bureau to testify regarding his activity, and that of others, in the sale of securities in New Jersey, and to bring with him "[a]ll personal records of Mortimer L. Schultz [petitioner] and First Jersey Servicing Co. including the records of any participating certificates sold by Mortimer L. Schultz, bookkeeping records and financial statements of Mortimer L. Schultz's activities, San-Mac Associates,

[and] Wiss Building Associates." The other subpoena served on Hirschfeld was directed to First Jersey Servicing Co., and required a forthwith appearance before the Bureau with "[a]ll books, records, papers and documents."

First Jersey Servicing Co. was wholly owned by petitioner. Sun-Mac Associates and Wiss Building Associates were limited partnerships in which petitioner was the sole general partner. Hirschfeld's relationship to petitioner and his companies has already been noted. Hirschfeld was served with the "forthwith" subpoenas previously mentioned, at his office, which was also petitioner's private office as well as the office of his various business enterprises.

As a result of the subpoenas served upon Hirschfeld on June 27, 1963, the Bureau of Securities obtained numerous records and documents, which petitioner later claimed were the business and personal records of himself and his family. On July 3, 1963, when petitioner appeared with counsel before the Bureau in response to the subpoena directed personally to him, he was only questioned concerning certain "Lin-Bay" properties, which questions he answered after his counsel stated on the record:

> "At this time, if I may interrupt, I think my client would like to exercise his privilege against stating anything which might incriminate him for the record."

After the questioning on the Lin-Bay properties had been concluded, and following some colloquy regarding petitioner's failure to produce records, he was excused and never asked to return. Petitioner states that when he appeared before the Bureau on July 3, 1963, the Bureau was in possession of the records it had obtained from

Hirschfeld, but that petitioner did not know this, nor was he informed of that fact. Petitioner contends he should have been told by the Bureau that it was then in possession of said record; also, that the manner in which the records were obtained, *via* the Hirschfeld subpoenas, was a subterfuge to defeat petitioner's right to immunity. It is to be noted that Lin-Bay, a limited partnership in which petitioner at one time had interest, was not at all involved in the criminal trial.

With this factual background, consideration will first be given to petitioner's claim that he was entitled to immunity from prosecution under N.J.S.A. 49:3-16(d), and then to his claim that some of the records used at his trial were obtained by an illegal search and seizure. The trial court afforded petitioner a hearing on both issues, but denied relief.

In affirming the convictions in this case, the Supreme Court of New Jersey held that there was no factual basis for a claim of immunity under the New Jersey statute. The court pointed out that petitioner was not subpoenaed to produce any records, and that he produced none; that any personal records of petitioner that were produced by the custodian (Hirschfeld) in response to the Bureau subpoenas "* * * may well have been part of the total records of the business operations because of the mode in which those operations were conducted." The court further pointed out that petitioner made no effort to show how any of the records bore upon his conviction; and that, in any event, no claim of privilege was made to the Bureau when the records were handed over.

There is no merit to petitioner's claim of immunity. N.J.S.A. 49:3-16 authorizes the New Jersey Bureau of Securities to investigate violations of the securities law and

to compel, through subpoena, the attendance of witnesses and the production of records. Subsection (d) of the statute provides that:

> "No person is excused from attending and testifying or from producing any document or record before the bureau, or in obedience to the subpoena of the bureau chief or any officer designated by him, or in any proceeding instituted by the bureau, on the ground that the testimony or evidence (documentary or otherwise) required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after claiming his privilege against self-incrimination, to testify or produce evidence (documentary or otherwise), except that the individual testifying is not exempt from prosecution and punishment for perjury, false swearing or contempt committed in testifying."

The statute clearly grants immunity from criminal prosecution to an individual who, after claiming his privilege against self-incrimination, is compelled to testify or produce documentary evidence. But there must be a factual situation that comes within the statutory language before a grant of immunity is warranted. The testimony given by petitioner on July 3, 1963, regarding the Lin-Bay properties, is not here in issue. The claim of privilege that was asserted on that day by petitioner's counsel, even assuming its validity, cannot be construed to extend to matters concerning which petitioner neither testified nor produced records. In response to the subpoena served upon him personally, petitioner appeared and testified only with

respect to Lin-Bay. He was not subpoenaed or compelled to produce any records, and he produced none.

Petitioner's reliance on the cases of *People ex rel. Kenny* v. *Adams,* 292 N. Y. 65, 54 N. E. 2d 10 (1944), and *United States* v. *Hopps,* 215 F. Supp. 734 (D. Md. 1962), aff'd 331 F. 2d 332 (4 Cir. 1964), is misplaced.

In *Kenny,* the defendant was compelled, under threat of arrest, to turn over to state authorities, pursuant to a "forthwith" subpoena, certain books and records in his private business, prior to his required appearance before said state authorities. In holding that the defendant was entitled to immunity, the court found as a sufficient basis therefor the fact that the state authorities had compelled the defendant, over his objection, to submit his records to them pursuant to the subpoena directed to him. No such factual situation is present in the case at bar.

In *Hopps,* the defendant was convicted of using the mails to defraud in connection with the sale of securities. One of the contentions made by the defendant was that he was entitled to immunity under Article 23-A, §359, of the New York General Business Law. This statute provides that a person shall not be prosecuted if he is directed, over his request to be excused, to produce documents by state authorities in a securities investigation. The subpoena in *Hopps* was addressed to the custodian of certain corporate and other records which the defendants claimed belonged to him. It was held that since the defendant did not produce these records pursuant to a subpoena directed to him in the state proceedings, he was not entitled to immunity under the New York statute. It was also held that there was no basis for the contention that the manner in which the records were acquired was a subterfuge to defeat the defendant's immunity. *Hopps* can hardly be considered an authority that favors petitioner.

*Appendix A*

Turning now to petitioner's contention that some of the records used at his trial were obtained by an illegal search and seizure, the Supreme Court of New Jersey held that "[t]here was no search or seizure. There was a subpoena, and the representative of the corporation and limited partnerships complied with the subpoena without protest."

A subpoena *Duces tecum*, or an order authorized by law, calling for the production of records, may be so broad and sweeping as to constitute an unreasonable search and seizure under the Fourth Amendment. *Boyd* v. *United States*, 116 U. S. 616 (1886); *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298 (1924); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946); *See* v. *City of Seattle*, 387 U. S. 541 (1967); *United States* v. *Hopps*, 215 F. Supp. 734, aff'd 331 F. 2d 332; *In Re Grand Jury Subpoena Duces Tecum*, 203 F. Supp. 575 (S. D. N. Y. 1961), and cases cited therein. The Fourth Amendment right against unreasonable searches and seizures is applicable to the states under the due process clause of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

Corporate records, like personal papers, may also enjoy the Fourth Amendment constitutional protection from unreasonable searches and seizures. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); *See* v. *City of Seattle*, 387 U. S. 541 (1967). Partnership records are treated the same as personal records so far as this constitutional right is concerned. *United States* v. *Brasley*, 268 Fed. 59 (1920); *In Re Subpoena Duces Tecum*, 81 F. Supp. 418 (N. D. Cal. 1948). Of course, a person must have standing in order to be entitled to object to the use of records in a criminal proceeding against him on the ground of an alleged illegal search and seizure. *Jones* v. *United States*, 362 U. S. 257 (1960); *Schwimmer* v. *United*

*States,* 232 F. 2d 855 (8 Cir. 1956); *Henzel* v. *United States,* 296 F. 2d 650 (5 Cir. 1961); *DeForte* v. *Mancusi,* 379 F. 2d 897 (2 Cir. 1967). Once standing to object is established, the court must then apply federal standards to determine whether or not there has been an unreasonable search and seizure by state officials. *Elkins* v. *United States,* 364 U. S. 206 (1960). The resolution of this question depends upon a number of factors. The court must determine whether the records to be produced are relevant to the investigation being pursued, whether such records are specified with reasonable particularity, and whether the records cover a reasonable period of time. The Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive. *See* v. *City of Seattle,* 387 U. S. 541; *In Re Grand Jury Subpoena Duces Tecum,* 203 F. Supp. 575.

In the case at bar, the subpoenas served upon Hirschfeld on June 27, 1963, called for the production of all personal records of petitioner, as well as records of businesses of which he was the sole general partner or owner. The subpoenas were served at petitioner's private office, which was also his business office. There can be no question of petitioner's standing to raise his Fourth Amendment rights with respect to his business and personal papers. Nor is there any evidence in the record that petitioner consented to the delivery of these records to the state authorities under the Hirschfeld subpoenas or otherwise. Under applicable federal standards, the subpoenas served upon Hirschfeld were unlimited either as to relevancy, specificity, or time. They were so broad and sweeping in scope as to call for production of all petitioner's books and records, both business and personal. On the basis of said subpoenas, petitioner's records were immedi-

ately removed from his office, and in his absence, by the Bureau of Securities, and by it turned over to the prosecutor for use at petitioner's trial.

At the hearing before the trial judge, on petitioner's motion to suppress use of the records, the prosecutor admitted that most of the records offered at the trial were received from the Bureau of Securities. It also appears that the Bureau's investigation of petitioner's affairs was a cooperative effort with the prosecutor's office, and also that such investigation led directly to the filing of the first criminal complaint against petitioner on July 11, 1963.

Under all of these circumstances, the production of petitioner's records pursuant to the subpoenas served upon Hirschfeld constituted an unreasonable search and seizure in violation of petitioner's Fourth Amendment rights, and the documents obtained thereby should have been suppressed for use as evidence at his trial.

With respect to comments made by the trial judge and the prosecutor on petitioner's failure to testify in his own behalf, the record discloses that 23 such comments were made during the course of the trial.[1] The typical comment by the prosecutor took the form of an objection to a question put by petitioner to a witness on cross-examination, followed by a statement that petitioner would have his opportunity to testify if he so desired. The typical remark by the judge, to the effect that he could not permit petitioner to testify until he took the witness stand and was sworn, was uttered either *sua sponte* or in ruling on an objection.

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[1] These may be found in the following dated transcripts, at the pages indicated: May 22, at pp. 351, 352; May 25, at pp. 485, 493; June 1, at pp. 39, 66, 67, 105, 112, 113, 115; June 2, at p. 80; June 3, at pp. 210, 238a, 245; June 4, at p. 103; June 8, at pp. 51, 55, 56, 64, 112; June 9, at p. 114; June 10, at pp. 154, 177; June 11, at p. 49.

*Appendix A*

In addition to the comments made during the trial, the prosecutor, in the course of his sumamtion, commented 12 times on the failure of petitioner to testify in his own behalf, and asked the jury thereby to infer petitioner's guilt from his silence.[2] For example, at one point during summation, the prosecutor stated:

> "The Court will instruct you may—you may infer he could not truthfully deny the fraudulent intent that is dictated by these facts."

The trial judge did so charge the jury, despite petitioner's inartfully drawn but clear request that the judge make no mention in his charge of petitioner's failure to testify. On this point, the judge charged:

> "The State has commented upon the fact that the defendant has not taken the stand. As a matter of fact, Mortimer L. Schultz did not take the stand, and under our law a defendant cannot be compelled to testify. His failure to be a witness in his own behalf raises no presumption of guilt, but if facts are testified to which tend to prove his guilt, which facts he could by his oath deny, his failure to testify in his own behalf raises a permissible inference that he could not truthfully deny those facts."

It is to be noted that when this charge was delivered, the instruction given by the trial judge regarding petitioner's failure to testify, was permissible under New Jersey law as then understood and applied. *State* v. *Corby,* 28 N. J. 106 (1958).

After being instructed on the whole case, which instructions included the *Corby* rule as herein quoted, the jury

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[2] See transcript of June 15, 1964, pp. 2-57, and especially pp. 9, 38, 43, 55, and 56, relating to the issue of fraudulent intent.

retired and began its deliberations on June 15, 1964, at 5:05 P.M. These deliberations continued until 11:00 P.M. On June 16, at 9:30 A.M. the jury reconvened and resumed its deliberations. Shortly after 11:00 A.M. of that day the court, at the request of the prosecutor, recalled the jury and ordered it to cease further deliberations. The prosecutor's request was prompted by an article that had appeared in The New York Times that very morning reporting the opinion handed down the previous day by the Supreme Court of the United States in *Malloy* v. *Hogan*. After a discussion of the problem posed by this decision, during which petitioner unsuccessfully moved for a mistrial, the court recalled the jury at 1:55 P.M. and charged it as follows:

> The Court: "Outside your presence and in the presence of the defendant, the Prosecutor has moved to have the Court recharge you due to a very recent decision of the United States Supreme Court. He has furnished me with a copy to charge, which has been written and a copy furnished to Mr. Schultz. This Request to Charge is incorporated in the subsequent charge to you with some modification, but only after consultation with the defendant, Mr. Schultz, and with the Prosecutor and this has already been read to them. I had previously charged you as follows in part. This is in reference to Mr. Schultz, quote:
>
> " 'His failure to be a witness in his own behalf raises no presumption of guilt, but if facts are testified to which tend to prove his guilt, which facts he could by his own oath deny, his failure to testify in his own behalf raises a permissible in-

ference that he could not truthfully deny those facts.'

"This portion of the charge that I have just referred to shall be disregarded in every respect, and not be applied by you as the law in this case. You will consider it as not charged and likewise I instruct you that any and all comments made by the Prosecutor either during the course of the trial or in argument, or in summation in regard to the failure of the defendant to testify, are also stricken and must be disregarded, and I give you the following charge which shall govern your deliberations:

"This defendant as are all defendants in criminal cases is presumed to be innocent, and this presumption of innocence stays with the defendant throughout the trial, and until you, the members of the Jury, reach a verdict. The failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him, and you are charged that you must not permit the fact that he failed to take the stand to weigh in the slightest degree against the defendant, nor shall this fact enter into the discussions or deliberations of the Jury in any manner.

"I do charge you, however, that in your deliberations you shall decide the case upon all of the evidence before you offered by the State and by the defendant, and all of the facts and circumstances in reaching your ultimate determinations in deciding the defendant's innocence or guilt. You are to consider all of the instructions as I have previously given them to you, except as modified by this charge in your deliberations."

After receiving these instructions, the jury again retired tc deliberate, and at 5:00 P.M. on June 16, 1964, returned the verdicts previously mentioned herein.

This being the sequence of events, one can appreciate the dilemma caused by *Malloy* v. *Hogan* at the time it was brought to the trial judge's attention. The transcript[3] reflects the judge's deep concern not only with the charge as originally given to the jury in regard to petitioner's failure to testify, but also with the prosecutor's summation wherein on "at least four or five occasions he commented in his summation and rather strongly about the failure of the accused to testify."

It is apparent that both the trial judge and the prosecutor recognized that *Malloy* raised a serious federal constitutional question as to the propriety of the comments regarding petitioner's failure to testify that had been made not only during the course of the trial, but also in the prosecutor's summation, and in the court's initial charge to the jury. As has been noted, it was sought to withdraw such comments by the supplemental charge previously mentioned herein. A reading of that charge discloses, however, contrary to the State's assumption, that the attempted withdrawal was limited to the comments made by the prosecutor during trial and in summation. It appears that, through inadvertence, the trial judge said nothing to the jury about disregarding the comments he himself had made throughout the trial.

*Maloy* v. *Hogan,* 378 U. S. 1 (1964), decided that the Fourteenth Amendment makes the Fifth Amendment prohibition against infringement of the privilege against self-incrimination applicable to the States, and that the same standards must determine whether the silence of an ac-

[3] See transcript of June 15-16, 1964, pp. 53-80.

cused, in either a state or federal proceeding, is justified. In view of *Malloy,* there was "no legitimate escape" from the rule enunciated in *Griffin* v. *California,* 380 U. S. 609 (1965), that the Fifth Amendment "in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."

Petitioner argues that regardless of what the law of New Jersey may have been under *Corby,* his federal constitutional rights should be measured by the principles laid down in *Malloy* and *Griffin;* that when so measured against the principles of those cases, it is clear that such rights were violated; and that the court's supplemental charge to the jury did not cure the situation or erase the prejudice and harm that had been done.

The Supreme Court of New Jersey has recognized that the *Corby* rule is no longer good law, and has, since *Griffin* reversed convictions because of comments made by the prosecutor, or the judge, or both, on a defendant's failure to testify. *State* v. *Lanzo,* 44 N. J. 560 (1965); *State* v. *Aviles,* 45 N. J. 152 (1965); *State* v. *Davis,* 45 N. J. 195 (1965). And see, also, *State* v. *Pickles,* 46 N. J. 542 (1966); *State* v. *Persiano,* 91 N. J. Super. 299 (App. Div. 1966).

*Griffin* was decided on April 28, 1965. In *Tehan* v. *Shott,* 382 U. S. 406 (1966), the *Griffin* rule was limited in its application to cases still pending on direct review at the time *Griffin* was decided. The case at bar was not decided by the state Supreme Court until January 24, 1966, hence it must be assumed that *Malloy* and *Griffin* were the law of this case at the trial and appellate levels. It follows, then, that unless it can be shown that the comments and instructions here challenged were harmless and

not prejudicial to petitioner, or that petitioner's conduct resulted in a waiver of his privilege against self-incrimination, or that the supplemental charge was sufficiently effective to neutralize any error that may have occurred, petitioner is entitled to the relief he seeks in this Court. This determination, of course, must be made according to federal, and not state, standards.

The State's claim that petitioner's conduct invited or justified the comments that were made, must be viewed in the context of the entire record. Petitioner may be "an informed, articulate, and intelligent man", but he is not a lawyer. He made many mistakes in attempting to properly formulate the questions he put to witnesses. This ineptness brought forth from the judge the very first comment on petitioner's right to testify. This occurred on May 22, 1964, the fourth day of a trial that was to continue until June 16. The occasion was a question to which objection was made by the prosecutor on the ground of irrelevancy, and not because petitioner was trying to testify. The court directed petitioner to reframe the question, and then added:

> "Well, when you get on the witness stand and you are sworn, I will permit you to testify, but I can't let you testify when you are acting as counsel."

And again, on May 25, after petitioner had put a rather involved question to a witness, the prosecutor stated he had no objection to the "multi-question". This was followed by the court's comment that:

> "I have no objection to it either, but I would like to have a statement from Mr. Schultz that he intends to go on the witness stand to contradict this witness."

When these comments were made, the court could not then have known whether or not petitioner intended to testify. With respect to the May 22 incident, a ruling sustaining the prosecutor's objection and directing petitioner to reframe his question should have sufficed. And an appropriate ruling could likewise have been made on the "multi" question, without commenting on petitioner's right to take the stand to contradict the witness. These comments and many more were made by both the judge and the prosecutor throughout the course of the trial. See in this connection references cited in footnote 1 of this memorandum. See also, *State* v. *Davis,* 45 N. J. 195, 197 (1965), for suggested practice to be followed where comment is made on a defendant's failure to take the witness stand.

It is not to be doubted, because of the complexity and duration of petitioner's trial, and because of petitioner's *pro se* status, that the trial judge was confronted with difficult and trying situations. But the record does not support the conclusion that petitioner, by his conduct, invited or justified the challenged comments, or that such conduct resulted in a waiver of his federal constitutional rights. There could hardly have been a waiver of petitioner's constitutional privilege against self-incrimination by virtue of his conduct during the trial when it is realized that no such privilege was available to petitioner until after *Malloy* became the law of the case on the "comment" issue. And this did not occur until after the trial had been concluded and the judge delivered his initial charge to the jury.

To be sure, there are cases in which a *pro se* defendant's conduct may be such as to warrant comment on his failure to testify, and result in a waiver or forfeiture of his privilege against self-incrimination. Illustrative is

*Appendix A*

*Redfield* v. *United States,* 315 F. 2d 76 (9 Cir. 1963). See, also, *Smith* v. *Unted States,* 234 F. 2d 385 (5 Cir. 1956). Each case, of course, turns on its own facts.

In *Redfield,* for example, the court relied upon the waiver theory, and found support therefor in a record which demonstrated that:

> "* * * Redfield persistently testified, though not under oath, throughout his trial. He did this voluntarily while purporting to act in the role of counsel, and in flagrant and contemptuous disregard of repeated admonitions and orders from the bench not to testify without first being sworn."

In the case at bar, a reference to the record[4] will show that petitioner's conduct, while sometimes one of confusion, was respectful of the court, and indicative of a desire to act in accordance with the judge's rulings and instructions.

Notwithstanding all the comments that were made, the State argues that petitioner was not harmed or prejudiced thereby because in his summation petitioner admitted all of the facts of the case. But this ignores the crucial issue of fraudulent intent, which petitioner specifically denied, and which the judge and the prosecutor in-

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[4] See transcript of June 4, 1964, at p. 41, wherein the trial judge, in addressing petitioner, said:

> "This can go on in the record. I have no objection to it, but I just at this point—I don't know what's going to happen later on. The defendant has appeared pro se. I am not trying to hand you anything. I am serious when I say that I think you have handled yourself exceptionally well for a layman and tried a very good case so far. As to the result, I am not the one who finds the facts. I only deal in questions of law. I will say, Mr. Schultz, that you have conducted yourself as a gentleman."

dicated could be inferred from petitioner's failure to take the stand. In his summation,[5] petitioner told the jury:

> "• • • Have I taken the stand? I could have done nothing but say the facts are true the intent is gone and there is no intent. What else could I say? What else could I explain?"

In *United States* v. *Curtiss,* 330 F. 2d 278 (2 Cir. 1964), involving an appeal by a *pro se* defendant from a conviction for income tax evasion, it was held that the prosecutor's statements on summation constituted prejudicial comment on defendant's failure to take the stand. The court further held that defendant's summation as his own attorney did not amount to a waiver of his Fifth Amendment protection, and that defendant's efforts to argue his case in summation with facts outside the record could not be used as an excuse by the prosecutor to disregard the no-comment rule. The proper remedy for the prosecutor in such a situation, said the court, is not the adopting of unfair procedures, but in proper objections to the trial judge who can rule that argument outside the record is not permitted, strike such argument where appropriate, and properly charge the jury on the point.

It is also contended by the State that petitioner's summation invited the comment that was made by the prosecutor when his turn came to sum up. Support for this proposition is based on *United States* v. *Feinberg,* 140 F. 2d 592 (2 Cir. 1944). That case is readily distinguishable. In *Feinberg,* it was defense counsel who initiated the comment issue, and the prosecutor was held to be justified under the facts of that case in offering to the jury an explanation as to why the defendant did not take the stand.

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[5] For the full summation, see the transcript of June 15, 1964, pp. 11-76.

See also *Barker* v. *United States,* 115 F. 2d 533 (8 Cir. 1940). In the instant case, petitioner's summation could hardly be said to be a sufficient provocation to justify the prosecutor's comments. On this record, the indications are that it was petitioner who was placed in a position that compelled him, in his summation, to answer the numerous comments of the judge and the prosecutor that were made in the course of the trial. This Court is satisfied that the prosecutor's comments in his summation were not justified on the basis of any theory of waiver or invitation by petitioner.

The State Supreme Court, in its *per curiam* opinion, stated it could not find that "the comments during the trial or in the court's charge to the jury offended controlling federal doctrine", and added that "the comments were in fact withdrawn in the supplemental instruction." Reference was made in the opinion to the California Supreme Court decision of *People* v. *Teale,* 404 P. 2d 209.

In that case, which was tried before *Griffin,* the prosecutor, as then permitted by a California constitutional provision, extensively commented on the failure of defendants to testify, and the trial judge charged the jury that it could draw adverse inferences from such failure. After the trial, but before the case was considered on appeal, the state constitutional provision was invalidated by *Griffin.* The California Supreme Court, notwithstanding *Griffin,* and in reliance on California's "harmless-error" rule, upheld the convictions, finding from other substantial evidence in the case that proof of guilt was overwhelming.

After the petition for relief in this Court was filed, the Supreme Court of the United States reversed *Teale, sub nom. Chapman* v. *California,* 386 U. S. 18 (1967), and enunciated the rule that

> "* * * before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The court went on to say that in view of the continuous and repeated references by the prosecutor and the judge to the defendants' failure to testify, and to the inferences that could be drawn therefrom, the State had not demonstrated, beyond a reasonable doubt, that such comment and instructions did not contribute to the convictions. See, also, *Fahy* v. *Connecticut*, 375 U. S. 85 (1963).

*Chapman* recognizes that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." But that same case makes it clear that before a federal constitutional error can be held harmless, the state court must now be able to declare a belief that the alleged error was harmless "beyond a reasonable doubt." No such showing could be made on the basis of the record in this case. As in *Chapman*, so here, there were continuous and repeated references by the judge and the prosecutor to petitioner's right and failure to take the stand and testify in his own behalf. Such "machine-gun repetition of a denial of constitutional rights" can hardly be considered harmless error. This Court is satisfied from an examination of the record as a whole, that petitioner's federal constitutional rights were violated in light of the federal standards established by *Malloy*, *Griffin*, and *Chapman*.

It remains to consider whether the trial court's supplemental charge was sufficiently effective to eliminate or

neutralize the errors that occurred in this case. From May 22, 1964, when the judge made his first comment about petitioner taking the witness stand, to 1:55 P.M. on June 16, 1964, when the judge gave his supplemental charge, the jury had heard the numerous references made by the judge and the prosecutor on petitioner's right to testify and his failure to do so. The prosecutor stressed this failure to testify in his summation, and the judge initially charged the jury that an adverse inference could be drawn from such facts. The jury had deliberated 7½ hours under the guidance of the initial charge before it was recalled some hours later to be told that they were to disregard that portion of the charge dealing with petitioner's failure to testify, permissible inferences that could be drawn therefrom, and the prosecutor's comments.

This Court is of the opinion that the cumulative effect of the comments that were made in this case regarding petitioner's right and failure to testify, were so overwhelming when considered in conjunction with the court's initial erroneous charge, that the supplemental charge, as given, was legally insufficient to cure the situation. See *Krulewitch* v. *United States,* 336 U. S. 440, 453 (1949); *Stewart* v. *United States,* 366 U. S. 1 (1960); *DeLuna* v. *United States,* 308 F. 2d 140, 154 (5 Cir. 1962); *United States* v. *Schwartz,* 325 F. 2d 355, 358 (3 Cir. 1963); *United States* v. *Clarke,* 343 F. 2d 90, 93 (3 Cir. 1965). In any event, it is clear on this record, that the State has not demonstrated, beyond a reasonable doubt, that the challenged comments and instructions did not contribute to petitioner's conviction. *Chapman* v. *California,* 386 U. S. 18, 2.

For the reasons stated herein, it is, on this 21st day of November, 1967,

*Appendix A*

ORDERED, that a writ of habeas corpus issue, without prejudice to the right of the State of New Jersey to retry petitioner if it elects to do so; and it is further

ORDERED, that copies of this Memorandum and Order be served by the United States Marshal upon the Prosecutor of Essex County and respondent Warden of the New Jersey State Prison, within eight (8) days from the date hereof.

ANTHONY T. AUGELLI
United States District Judge

# APPENDIX B

**Opinion of the United States Court of Appeals for the Third Circuit (Reported in 403 F. 2d 693)**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17066

MORTIMER L. SCHULTZ,

v.

HOWARD YEAGER,
WARDEN, NEW JERSEY STATE PRISON,
*Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued September 19, 1968

Before McLAUGHLIN, KALODNER and ALDISERT,
*Circuit Judges*

OPINION OF THE COURT

(Filed—November 20, 1968.)

PER CURIAM

Appellee was indicted by a New Jersey Grand Jury for various types of commercial fraud. He was thereafter

tried and convicted on 67 of the 74 counts of the indictment. Four of said counts were dismissed in the course of the trial; on three of the counts appellee was found not guilty. The judgments of conviction were affirmed by the State Supreme Court and certiorari was denied by the United States Supreme Court. Thereafter appellee applied to the United States District Court for a writ of habeas corpus alleging that said conviction was in violation of his rights underthe Four and Fifth Amendments to the United States Constitution. Inter alia, appellee charged that his conviction was based on evidence obtained by illegal search and seizure; he also complained of comments by both the trial judge and the prosecutor regarding his failure to testify in his own behalf and that the jury could infer therefrom that he could not truthfully deny the facts of fraudulent intent presented at the trial.

It is clear that by means of a subpoena duces tecum served personally upon Sherman Hirschfeld, appellee's comptroller and office manager of his corporation and limited partnerships, personal records of appellee were demanded of and produced by Hirschfeld and were introduced as trial evidence against appellee.

The references by the judge and the prosecutor as to appellee testifying were made throughout the trial. As Chief Judge Augelli in the District Court correctly states in his opinion:

> "With respect to comments made by the trial judge and the prosecutor on petitioner's failure to testify in his own behalf, the record discloses that 23 such comments were made during the course of the trial.[1] The typical comment by the prosecutor took the form of an objection to a question put by petitioner to a witness on cross-examination,

followed by a statement that petitioner would have his opportunity to testify if he so desired. The typical remark by the judge, to the effect that he could not permit petitioner to testify until he took the witness stand and was sworn, was uttered either *Sua Sponte* or in ruling on an objection. (Footnote not quoted.)"

On Monday, June 15, 1964, the Prosecutor in his summation, called the jury's attention twelve times to the fact that appellee had not appeared as a witness and he asked the jury to infer appellee's guilt for that reason. That same day the judge in his charge, over appellee's objection, stressed the identical point. At that time, as far as the court and counsel for both sides knew, those remarks were proper in full accord with existent law. State v. Corby, 28 N. J. 106 (1958). It happened that on the same day, the United States Supreme Court by its opinion in Malloy v. Hogan, 378 U. S. 1 (1964) prohibited any trial comment concerning failure of a defendant to testify for himself. The next day the trial judge having been made aware of the Malloy holding, recalled the jury. In recharging that body he stated what he had charged originally on the matter and then said:

> "This portion of the charge that I have just referred to shall be disregarded in every respect, and not be applied by you as the law in this case. You will consider it as not charged and likewise I instruct you that any and all comments made by the Prosecutor either during the course of the trial or in argument, or in summation in regard to the failure of the defendant to testify, are also stricken and must be disregarded, and I give you the following charge which shall govern your deliberations:

*Appendix B*

"This defendant as are all defendants in criminal cases is presumed to be innocent, and this presumption of innocence stays with the defendant throughout the trial, and until you, the members of the Jury, reach a verdict. The failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him, and you are charged that you must not permit the fact that he failed to take the stand to weigh in the slightest degree against the defendant, nor shall this fact enter into the discussions or deliberations of the Jury in any manner.

"I do charge you, however, that in your deliberations you shall decide the case upon all of the evidence before you offered by the State and by the defendant, and all of the facts and circumstances in reaching your ultimate determinations in deciding the defendant's innocence or guilt. You are to consider all of the instructions as I have previously given them to you, except as modified by this charge in your deliberations."

As is seen the judge made no mention of his trial statements, prior to the charge, relating to appellee not testifying. The Prosecutor, arguing before this Court for appellant, maintains that "The fact that the supplemental charge did not refer to comments made by the trial judge during the course of the trial is of no moment." The opinion below regards this inadvertent omission as of importance. In exhaustively examining the whole trial situation, complicated by the circumstance that appellee, a non lawyer appeared pro se, the District Court warrantably ruled that there was no waiver by appellee of his constitutional privilege against self incrimination. The

Court finally concluded that the supplemental charge was not sufficiently effective to neutralize any error that may have occurred. Malloy v. Hogan, supra; Griffin v. California, 380 U. S. 609 (1965); Chapman v. California, 386 U. S. 18 (1967).

From our own examination of this appeal we must conclude that the temperate, careful opinion of Chief Judge Augelli is sound in fact and in law. The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

# APPENDIX C

## Judgment of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,066

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MORTIMER L. SCHULTZ

*vs.*

HOWARD YEAGER, Warden,
New Jersey State Prison,

Appellant

---

(D. C. Civil Action No. 664-66)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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Present:

McLAUGHLIN, KALODNER and ALDISERT,
*Circuit Judges,*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

*Appendix C*

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed November 21, 1967, be and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN
Clerk

November 20, 1968

# APPENDIX D

## Order of United States Court of Appeals for the Third Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,066

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MORTIMER L. SCHULTZ,

*v.*

HOWARD YEAGER, Warden,
New Jersey State Prison,

*Appellant.*

---

Present:

HASTIE, *Chief Judge,* and MCLAUGHLIN, KALODNER, FREEDMAN, SEITZ, VAN DUSEN and ALDISERT, and STAHL, *Circuit Judges*

ORDER

Appellant's petition for rehearing in the alternative asks that he be advised "as to whether the corporate and partnership documents may be used by the State at retrial." The District Court held that partnership records are treated the same as personal records with respect to Fourth Amendment search and seizure. We agree with that view. Strictly corporate records which would not

give appellee the right to plead the Fifth Amendment respecting them are not for such reason barred from admission as evidence in the retrial of this case.

The petition for rehearing is denied.

By the Court,
KALODNER
*Circuit Judge*

Dated: December 23, 1968

# APPENDIX E

**Opinion of the Supreme Court of New Jersey**
**(Reported in 46 N. J. 254, 216 A. 2d 372)**

THE STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT,
v. MORTIMER L. SCHULTZ, DEFENDANT-APPELLANT.

Argued November 23, 1965—Decided January 24, 1966.

The opinion of the court was delivered

PER CURIAM. Defendant was tried on 12 indictments containing a total of 74 counts, involving sundry charges arising out of substantial swindles. Four counts were dismissed at trial. The jury convicted defendant on 67 of the remaining 70 counts. The sentences imposed aggregated 10 to 20 years in State Prison. We certified defendant's appeal before argument in the Appellate Division.

The first issue relates to comments upon defendant's failure to take the stand.

The trial started on May 13, 1964. The jury was charged by the trial court on June 15. It was on that day that *Malloy* v. *Hogan*, 378 U. S. 1, 84 St. Ct. 1489, 12 L. Ed. 2d 653 (1964), was handed down. Defendant not having taken the stand, the trial court commented upon that failure in accordance with the then settled view in our State, saying that defendant's failure to testify did not raise a presumption of guilt and that the presumption of innocence nonetheless obtained, but that the jury may infer defendant could not truthfully deny those incriminating facts in the testimony which he could meet by his own oath.

*Appendix E*

Upon learning the content of *Malloy,* the prosecutor, apprehending that that decision might led to a disapproval in constitutional terms of the instruction here given, asked the trial court to recall the jury and to instruct it to draw no inference whatever from defendant's failure to testify. The trial judge acceded to the prosecutor's request, charging the jury in part as follows :

> "This portion of the charge that I have just referred to shall be disregarded in every respect, and not be applied by you as the law in this case. You will consider it as not charged and likewise I instruct you that any and all comments made by the Prosecutor either during the course of the trial or in argument, or in summation in regard to the failure of the defendant to testify, are also stricken and must be disregarded, and I give you the following charge which shall govern your deliberations:
>
> > 'This defendant as are all defendants in criminal cases is presumed to be innocent, and this presumption of innocence stays with the defendant throughout the trial, and until you, the members of the jury, reach a verdict. The failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him, and you are charged that you must not permit the fact that he failed to take the stand to weigh in the slightest degree against the defendant, nor shall this fact enter into the discussions or deliberations of the jury in any manner.' "

After the trial of the within case we held that *Malloy* v. *Hogan* and *Griffin* v. *State of California,* 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), must be read to pro-

scribe the instruction as initially given the jury in this matter notwithstanding that the instruction did not treat silence as evidence of guilt and limited its impact to the evaluation of evidence actually in the case, and indeed to direct evidence which a defendant could dispute on his own oath. We have held, too, that upon a direct appeal (compare *Tehan* v. *Shott,* 86 S. Ct. 459, Jan. 19, 1966) a defendant will be accorded the benefit of the new rule but on the basis of the case as tried and not upon a speculation as to how a defendant might have gone about his defense had he anticipated *Malloy* and *Griffin.* See *State* v. *Fioravanti,* 46 N. J. 109 (1965); *State* v. *Davis,* 45 N. J. 195 (1965); *State* v. *Aviles,* 45 N. J. 152 (1965); *State* v. *Lanzo,* 44 N. J. 560 (1965); *State* v. *Garvin,* 44 N. J. 268 (1965).

The trial was lengthy, as we have already noted. The jury received the case for deliberation at 5:05 P.M. on June 15. The deliberations were recessed at 11:00 P.M. Presumably the jurors took some time to eat. They reconvened at 9:30 A.M. on June 16. At 11:02 A.M. the prosecutor requested the court to recharge the jury. At 11:20 A.M. the jury was instructed to suspend deliberations. The jury resumed deliberations at 1:58 P.M., after receiving further instructions quoted above. The verdicts were returned at 5:00 P.M., and as we have already noted the jury acquitted defendant on three of the charges.

We are satisfied that upon the total circumstances of this case there is no reasonable basis for reversal, and we so conclude upon the following factors.

(1) Defendant, an informed, articulate, and intelligent man, who had been represented before trial by counsel of his own selection, chose to try the case himself. We gather that he consulted with his own counsel during the trial, and defendant's performance reveals some tutoring in legal

concepts and terminology. Nonetheless, defendant himself made his failure to take the stand a conspicuous fact that nothing could conceal. In cross-examining State's witnesses, he persisted in particularized statements of factual claims, which, but for a question mark tagged at the end, were simply his unsworn claims. Indeed defendant made specific assertions of fact without even the pretense that they were intended as questions. The prosecutor understandably responded to defendant's improper actions, and in the course of his response referred to defendant's right to take the stand. In dealing with the State's objections and motions, the trial court necessarily instructed the jury that unsworn assertions of fact must be disregarded. See *Smith* v. *United States,* 234 F. 2d 385, 388 (5 Cir. 1956). Thus the jury's attention was inevitably focused on defendant's right and failure to testify, and this because of defendant's decision to try the case and to try it his way. Indeed defendant's behavior led to something capable of greater impact than a mere comment to the effect that he did not take the stand, since the jury knew from defendant's statements that there was something he could say and tried to say but when the jury had to ignore for want of a verifying oath.

(2) Defendant was repeatedly warned with respect to unsworn factual assertions. Nonetheless he persisted, and the conviction seems inescapable that he did so in a calculated attempt to gain an advantage he could not have achieved through the services of a member of the bar. Such conduct has been held to warrant comment, in the nature of a fair response, which calls attention to a defendant's failure to take the stand. *Redfield* v. *United States,* 315 F. 2d 76 (9 Cir. 1963); *Smith* v. *United States, supra,* 234 F. 2d 385; but *cf. United States* v. *Curtiss,* 330 F. 2d 278 (2 Cir. 1964).

(3) Despite the warnings mentioned above, defendant said in his summation:

> "* * * Have I taken the stand? I could have done nothing but say the facts are true the intent is gone and there is no intent. What else could I say? What else could I explain?
>
> "I don't deny the checks were drawn to me, but they were proper. I don't deny I got seventy-six units of Wiss, but they were proper. I don't deny there were short-sales or over-allocations in connection with the operation of the creation of the real estate syndication business, but in due course they were properly covered with the full knowledge of our accountants and of our Board of Directors, of our attorneys, and they participated in it, and if it was wrong they would never have participated. * * *"

In passing we note that the reason given for not testifying does not square with defendant's earlier statement at side bar that he hesitated to testify only because of a prior conviction of crime. At any rate, in his final attempt to communicate with the jury, defendant acknowledged the truth of the very facts to which the court's comment applied. Thus while the comment would permit the jury to infer that defendant could not deny certain facts in the testimony, defendant himself told the jury those facts were true. The sole matter with which he took issue was the intent with which he did the sundry things proved against him. He does not suggest there was any direct testimony relating to intent, and hence the court's comment did not reach that subject. We note that in *United States* v. *Feinberg,* 140 F. 2d 592, 595, 154 A. L. R. 272 (2 Cir. 1944), a statement by defense coun-

sel as to what his client would have said on the stand was held to justify comment by the prosecutor upon the failure to testify. In any event, since defendant conceded everything to which the comment related, we see no possibility of harm.[1] *Cf. People* v. *Teale,* 45 Cal. Rptr. 729, 740, 404 P. 2d 209, 220 (Sup. Ct. 1965).

For these reasons we cannot find the comments during the trial or in the court's charge to the jury offended controlling federal doctrine. To this we add that the comments were in fact withdrawn in the supplemental instruction. Indeed, in withdrawing the comment the trial judge charged that the fact that defendant failed to take the stand shall not "enter into the discussions or deliberations of the jury in any manner." In thus instructing the jury that defendant's silence must be disregarded, the trial judge may have accorded defendant an instruction which the Federal Constitution does not require. That question was expressly reserved in *Griffin* v. *State of California, supra,* fn. 6, 380 U. S., at p. 616, 85 S. Ct., at p. 1233, 14 L. Ed. 2d, at p. 110:

> "We reserve decision on whether an accused can require, as in Bruno v. United States, 308 U. S. 287, 60 S. Ct. 198, 84 L. Ed. 257, that the jury be instructed that his silence must be disregarded."

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[1] Defendant does not attempt to demonstrate the comments of the prosecutor and the trial court were harmful when viewed in the context of the whole record. In fact, defendant presented so little of the record that no such evaluation, if it were critical, could be made. The State on the other hand urges an erroneous comment never warrants a reversal unless it can be found to have been harmful in the light of the total case. We referred to that question, without deciding it, in *State* v. *Fioravanti, supra,* 46 N. J., at p. 121. Here, too, the question need not be met, because among the other things referred to above, the comment went no further than defendant's own admission in his summation and thus the possibility of harm was affirmatively dispelled.

*Appendix E*

II.

Next defendant claims an immunity from prosecution under N.J.S.A. 49:3-16(d), a provision of the Uniform Securities Law. The Bureau of Securities conducted an investigation under the provisions of the statute and ultimately succeeded in obtaining an injunction against this defendant. *Conroy* v. *Schultz,* 80 N. J. Super. 443 (Ch. Div. 1963).

Defendant's operations are described in the case just cited. He masterminded these swindles though the medium of corporations and a number of limited partnerships, he being, with one exception, the general partner and the individuals mulcted being sold what purported to be interests as limited partners. The corporate and partnership records were obtained by the Bureau of Securities by a subpoena addressed, not to the defendant, but to an individual who had custody of them and who was described in the record as the treasurer of the principal corporation involved.

Defendant seeks to claim immunity from prosecution under N.J.S.A. 49:3-16(a) which provides that a person must testify and must produce his records pursuant to subpoena but if he does so after claiming his privilege against self-incrimination he may not be prosecuted with respect to the transaction to which such testimony or records relate.

Defendant was not subpoenaed to produce any record, and he produced none, but he claims the custodian of the corporate and partnership records produced some personal records in response to the subpoena upon the custodian. Defendant did not identify those records in his brief but after argument he referred to us to nine of some

180 exhibits. The most we can find is that some of the exhibits produced by the custodian in response to the subpoena contained what appear to be individual entries concerning defendant, but for all we can tell, they may well have been part of the total records of the business operations because of the mode in which those operations were conducted. In any event, defendant makes no effort to show how any of those entries or records bears upon his conviction as to any count. Further, no claim of privilege was made to the Bureau when the records were handed over. In these circumstances there is no factual basis for a claim of immunity.

Defendant argues, as an incident to his basic claim of immunity, that the records were obtained by an illegal search and seizure. There was no search or seizure. There was a subpoena, and the representative of the corporation and limited partnerships complied with the subpoena without protest.

III.

The final point is that the sentence was manifestly excessive. We find no reason to question the trial court's judgment. *State* v. *Brown*, 46 N. J. 96 (1965).

The judgments are affirmed.

*For affirmance*—Chief Justice Weintraub and Justices Francis, Proctor, Hall and Haneman—5.

*For reversal*—None.